

1-1-1972

Welfare and Pension Plans: The Role of the Federal Prosecutor

Charles Ruff

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Charles Ruff, Symposium, *Welfare and Pension Plans: The Role of the Federal Prosecutor*, 12 SANTA CLARA LAWYER 480 (1972).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol12/iss3/2>

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

WELFARE AND PENSION PLANS: THE ROLE OF THE FEDERAL PROSECUTOR

Charles Ruff*

I. INTRODUCTION

The federal criminal code is not readily adapted to the regulation of complex institutions. As the ultimate sanction, criminal prosecution may act as an effective deterrent to the more egregious violations of the banking or securities laws, but it cannot be expected that such prosecutions serve as the principal or even as a primary regulating force. The Comptroller of the Currency and the Federal Deposit Insurance Corporation are closely involved with the internal operation of the banks and the Securities and Exchange Commission performs a similar function in the securities industry. Bank misapplication and securities fraud cases are frequent fare for the United States Attorney; however, their regulatory impact is secondary to that of the sanctions imposed by the administrative agencies.

It is surprising, then, that our system of private welfare and pension plans, although admittedly not equal in scope to the banking or securities industry, is left almost entirely without regulation, subject to virtually no interference with its internal operations. These benefit plans are vitally important to millions of people, yet the only sanction applicable to those charged with the administration of the plans is that provided by the criminal law and invoked by the federal prosecutor. The prosecutor's role is restricted principally by the narrowness of the statutory framework, and secondarily, by the limited manpower available to him and to the investigative agencies responsible for pursuing statutory violations. The question of whether this restricted role permits the prosecutor to have any measurable impact on the integrity of the pension and benefit system is the principal concern of this article.

Discussions about welfare and pension plans tend to begin with the revelation that such plans control more than one hundred billion dollars in assets, and continue with the admonition that no

* A.B. 1960, Swarthmore College; LL.B. 1963, Columbia Law School; Chief, Management and Labor Section, Criminal Division, United States Department of Justice. The views expressed herein are those of the author and do not reflect the views of the Department of Justice or any other federal agency.

area of the economy of that magnitude and potential economic impact can remain unregulated. Those concerned will also point out that benefit plan assets are in fact under the control of a relatively small group of men whose actions and motivations are subjected to only minimal restrictions. However, these homilies produce little either in the way of response from the Congress or from those who administer the plans—other than horrified disclaimers.

The problem must be attacked at a more practical level: does the law as it now stands protect the right of the individual plumber, carpenter, or bricklayer to have his medical bills paid and to collect his pension when he retires? Recent hearings of the Senate Subcommittee on Labor dealing with proposed legislation¹ designed to reach the increasingly serious problem of the individual's loss of pension benefits because of job changes, employer bankruptcy, and other related factors, have taken this practical approach. The record of the hearings is replete with cases where workers have contributed to their companies' pension plans for twenty-five years, only to be deprived of benefits at retirement.² However, this concentration on the problems of individual beneficiaries does have its pitfalls, for it permits the benefit plan industry to claim that the horror stories placed before the subcommittee were specially selected for their shock effect. As Senator Javits noted:

It has been stated to the press by officials of certain pension consulting firms that my conclusions on the basis of the preliminary findings are 'gross misrepresentations of the facts,' that the study is 'falacious material,' and that it is nothing more than a 'manufactured crisis which could lead to government control of the private pension system.'³

The spectre of governmental intrusion into the internal regulation of private pension plans has haunted Congress since the original Welfare and Pension Plans Disclosure Act was passed.⁴ At that time, it was decided that the individual worker, given a minimal amount of information about how his pension plan was being run, could and would exercise whatever control was needed. Even the 1962 amendments,⁵ although designed to permit more direct federal involvement, continued to be based on the theory that the individual ought to rely primarily on the good faith and

¹ The bill before the Subcommittee at the time of the hearings was S. 2, 92d Cong., 1st Sess. (1971), introduced by Senator Javits. On December 14, 1971, the Administration bill, S. 3024 (H.R. 12337), 92d Cong., 1st Sess. (1971), was introduced by Senator Javits and others.

² *Hearings on Examination of Private Welfare and Pension Plans before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 1st Sess. (1971).

³ *Hearings on Welfare and Pension Plans*, *Id.* at 88.

⁴ Act of Aug. 28, 1958, Pub. L. No. 85-836, 72 Stat. 997.

⁵ Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35.

commitment of his employer or union representative and only secondarily on the good faith and commitment of the federal government. Whether the federal government, and the federal prosecutor in particular, have been able to provide even part of the protection which is so desperately needed, is open to serious question.

II. THE PROBLEMS

It is not the purpose of this article to comment on the merits or demerits of the various legislative proposals which would establish federal standards for fiduciary conduct,⁶ portability,⁷ vesting,⁸ and termination.⁹ The problems addressed here are those bearing on the applicability of criminal sanctions to the conduct of individuals dealing with employee benefit plans and the enforcement of those sanctions.

As a basis for discussion of these problems five typical fact situations will be considered, some or all of which may call for the invoking of the criminal process by the federal prosecutor.¹⁰

1. In 1963, a man named Arsham took control of an Ohio sweater and yarn company called Cashmere Corporation of America. Almost immediately Arsham found himself in dire need of financing and in early 1964 made contact with a New York lawyer named Levy. Levy, after making a number of abortive efforts to obtain a mortgage for Arsham, finally arrived at the doorstep of Birnbaum, a mortgage broker. Levy and Birnbaum then discussed the possibility of getting the needed loan from a union pension fund.

Birnbaum and his associate Herbert Itkin met in June, 1964, with James Plumeri, a gentleman of somewhat unsavory background who was known to have influential contacts in the New York labor movement. Plumeri agreed to contact the Furriers Union about a loan for Cashmere. Because Cashmere was unable to furnish a satisfactory statement of assets, Plumeri was unable to secure the loan, and Arsham found it necessary to obtain some form of interim financing in order to keep his creditors at bay. In late August, 1964, Frank Zulferino, president of Local 10 of the

⁶ S. 2, 92d Cong., 1st Sess. Title IV, Part B (1971); S. 3024, 92d Cong., 1st Sess. § 14 (1971).

⁷ S. 2, 92d Cong., 1st Sess. Title III (1971).

⁸ *Id.*, Title I, § 107.

⁹ *Id.*, Title I, § 109.

¹⁰ Where noted these descriptions are taken from reported cases. The others, although based on fact, are the product of the author's imagination.

International Brotherhood of Production, Maintenance, and Operating Employees, agreed with Itkin that the Local 10 Welfare Fund would give Cashmere a loan commitment of \$1,200,000, so long as Cashmere would agree in writing that the loan would never have to be made. Zulferino demanded that Cashmere pay him \$24,000 in return for that commitment.

Itkin suggested to Levy that Arsham could use the Local 10 commitment to obtain short-term credit from a bank and told him that it would cost four percent of the value of the commitment to handle the payoffs involved in obtaining it. Levy agreed, and Itkin proceeded to make a number of cash payments to Zulferino, finally obtaining the written commitment which he gave to Levy minus the signature page pending receipt of his \$48,000 fee. Arsham produced the fee in October, and Itkin released the missing page, promising not to cash Arsham's checks unless Cashmere was able to secure a bank loan on the basis of the commitment. All went for naught when the Local 10 letter did not, in fact, produce the needed credit.

In November, the protagonists tried another tack. On Arsham's behalf, Samuel Berger contacted a Chicago broker, Robert Graff, at which point Graff came to New York to meet with Levy, Berger, Arsham, and Levy's cousin Yvette Feinstein. Graff then contacted Floyd Webb, a trustee of the Central States, Southeast and Southwest Area Pension Fund of the International Brotherhood of Teamsters, about the possibility of arranging a \$1.5 million loan from the Fund to Cashmere. Webb and Graff agreed that Webb would receive \$20,000 for his efforts. Graff then passed the word on to Berger, who agreed that they in turn would demand from Cashmere a fee of ten percent of the loan.

Meanwhile, Itkin, who was unwilling to give up entirely the prospect of receiving his \$48,000, arranged in mid-December for a meeting with Plumeri, Zulferino, Arsham, and Berger at which Cashmere's continuing need for interim financing pending the Teamsters loan was to be discussed. At that meeting, \$15,000 in interim financing was obtained, but Plumeri threatened to stop the Teamsters loan from going through unless Berger would guarantee Arsham's payment of the \$48,000. In fact, the \$48,000 was never paid.

In March, 1965, Arsham received a written commitment from the Teamsters, and Cashmere obtained the funds it needed by "banking"¹¹ the commitment letter at a Chicago bank. The \$150,000

¹¹ A borrower who receives a commitment from a pension fund for permanent

fee was divided among Graff, Berger, Levy, Levy's cousin, and Webb.¹²

2. A Midwest businessman engaged in manipulating the stock of his medium-sized electronics company on the over-the-counter market was concerned about the possibility that large blocks of the stock would be sold in the open market. Therefore, he tried his best to insure that any sales which did occur would be made at an artificially created price between buyers and sellers selected by him. At one point, he found himself faced with the necessity of finding a buyer for some \$500,000 of the stock. After failing to procure a buyer, he decided that, as a last resort, he would sell the stock to his company's employee pension plan of which he was a trustee. A problem was presented by the fact that the plan's assets totalled only \$400,000, but this difficulty was quickly resolved by arranging for the pension plan to borrow the purchase price from a local bank. It took the businessman almost a year to find another buyer who was willing to take the plan's stock at the price the plan had paid, but he finally arranged the sale and the plan was able to pay off the bank loan. The businessman was not able to reimburse the plan for the \$32,000 interest which it had paid on its loan.

3. An enterprising union leader in a large Eastern city specialized in organizing small companies, the employees of which were for the most part unskilled and frequently unable to speak, read, or write English. In return for a relatively small monthly contribution to the union's health, welfare, and pension fund, an employer was ensured that he would be free from interference with the conduct of his business and free from the threat that another, more energetic labor organization would seek to represent his employees.

The funds were properly established pursuant to trust agreements, which called for an equal number of employer and union trustees.¹³ However, the employer trustees were not particularly

financing will frequently take that commitment to a bank and secure immediate interim financing with the bank relying on the obligation of the fund to take over the loan at some later date.

¹² These transactions are described in *United States v. Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971), the trial of which resulted in the conviction of Levy on Count Two (Zulferino transaction) and Count Three (Webb transaction), both charging substantive violations of 18 U.S.C. § 1954, the conviction of Berger on Count Three and the conviction of Yvette Feinstein on Count Three. The court of appeals affirmed Levy's conviction on Count Two and Berger's on Count Three and reversed as to Levy on Count Three and reversed as to Feinstein. Mistrials were declared as to Zulferino and Plumeri because the former's attorney died and the latter became ill himself. Webb died before the indictment was returned. Itkin, Graff, Birnbaum, and Arsham testified for the government—Graff after a plea of guilty.

¹³ Labor Management Relations Act of 1947, § 302, now 29 U.S.C. § 186 (1970).

interested in what was done with the money they contributed and were all too content to leave the management of the funds to the union official, who staffed the pension plans with his family and friends. The operation was so profitable that the official decided to expand the plans by soliciting contributions from employers whose employees were not represented by his union but who might eventually wish to avail themselves of the benefits of the group health plan. This scheme provided the union leader with approximately \$100,000 a year in operating capital.

4. In 1956, James R. Hoffa, then the president of Local 299 of the International Brotherhood of Teamsters, initiated a scheme to use the assets of Local 299 to promote a Florida real estate project, Sun Valley, in which he held a concealed interest. He directed that \$500,000 of Local's funds be deposited in a Florida bank in a noninterest-bearing account in return for the bank's lending an equivalent amount to Sun Valley. By 1958, however, Sun Valley was in financial difficulty, and Hoffa himself was personally obligated on a \$25,000 note. He decided it was necessary to find sufficient capital to rescue the company from bankruptcy.

In 1958, Hoffa, who was by then International President and the dominant trustee of the Central States Pension Fund, undertook to rehabilitate Sun Valley. Two associates, Dranow and Burris, incorporated the Union Land and Home Company. The corporation paid off the note on which Hoffa was obligated and repaid Local 299 for the interest lost on the Florida bank account. Borrowers who sought loans from the Pension Fund were required to "invest" in the company, to pay inflated finders fees, to pay advances to Sun Valley's creditors, and to employ the accounting firm controlled by one of the conspirators.

These prospective borrowers, virtually all of whom were seeking high-risk loans, were represented to be reputable businessmen by Hoffa and his associates, although their loan applications were replete with false appraisals and audits, they were operating on borrowed capital, and they did not own the land on which they intended to build. Many of the loans proved to be less than secure, and the Fund was forced to grant moratoriums on payments due and to make additional loans to save the borrowers from collapse.¹⁴

5. In 1968, two building trade locals of moderate size decided

¹⁴ These transactions are described in *United States v. Hoffa*, 367 F.2d 698 (7th Cir. 1966), *vacated and remanded*, 387 U.S. 231 (1967). Hoffa, Dranow, and Burris, together with a fourth defendant, Kovens, were convicted of mail and wire fraud. The convictions became final with the denial of certiorari on January 11, 1971, 402 U.S. 988 (1971).

to set up a health and welfare fund which was to be insured with a nationally recognized company. A board of trustees was created, consisting of three union officers and three major employers. A trust agreement was drawn up setting forth the nature of the benefits to be furnished and providing that the trustees could select an administrator and pay him a reasonable fee for performing the record-keeping and accounting functions necessary to the operation of the plan. It was anticipated that the plan would have to cover approximately two thousand union members and would collect some three hundred thousand dollars a year in employer contributions.

One of the union trustees approached a friend who was a local insurance agent and suggested that he submit a bid for the administration contract. The agent was interested but questioned his financial ability to invest in the equipment and staff needed to undertake the management of the plan. The trustee suggested that the two of them form a corporation and borrow the necessary capital from the plan. Thus, the trustee and the agent went into business on the plan's money and with a guaranteed income, but their enterprise did not stop there. The agent, of course, received substantial administrative fees through the corporation and commissions on the insurance policies purchased by the plan. Realizing that his commissions were larger in the first two years of a policy's life, the agent in 1970, determined that the plan could be more effectively administered through a policy issued by a small, local insurance company. At the same time, he renegotiated the corporation's administrative contract with the plan. The trustees unanimously approved his request for a higher fee.

III. THE TOOLS

It is worth noting at the outset that federal criminal law is purely a creation of Congress. A theft may not be a federal crime unless it is from an entity specifically brought within the federal jurisdiction; a bribe may not be a federal crime unless paid to a member of a class defined by Congress; a fraud may not be a federal crime unless accomplished through interstate mail or telephone facilities. The federal prosecutor is, therefore, frequently faced with the unpleasant prospect of being unable to act in situations which require action. The local district attorney sometimes finds himself in a similar situation, not because of lack of jurisdiction, but rather because he is restricted by lack of investigative and prosecutive manpower. The federal prosecutor, on the other hand, usually has the manpower but not the jurisdiction, and it often requires an expansive imagination and experimentation to

bring obviously "criminal" conduct within the strictures of the federal criminal code.¹⁵

A major factor in the expansion of federal jurisdiction over crime is the capacity of the federal establishment to investigate and prosecute cases which, because of their interstate impact, inherent complexity, or political sensitivity, are not likely to be dealt with by local authorities. While almost every state has an embezzlement statute which would cover the theft of pension plan assets, very few such cases are ever brought to trial because the average district attorney and the average police force have no way of learning that the theft occurred, no way of providing the accounting manpower to investigate the theft, and have dockets much too crowded to be able to concern themselves with seeking out violations which may exist. Until 1962, there was no one to take up the slack in this particular area of law enforcement. Up to the time when amendments to the Welfare and Pension Plans Disclosure Act of 1958 created Section 664¹⁶ of Title 18, stealing from a pension plan was not a federal offense.

If, however, Congress had done no more than enact Section 664,¹⁷ it is unlikely that there would have been any substantial increase in federal involvement in this area. It is only the existence of a federal agency¹⁸ charged with enforcing reporting requirements and collecting reports from benefit plans and security companies, that creates the sources of information necessary to develop prosecutable cases under the statute. This is not to say that the disclosure required by the Welfare and Pension Plans Disclosure Act¹⁹ is, in and of itself, an effective remedy for the problems it was designed to solve. On the contrary, it has been made clear during the past fourteen years that the W.P.P.D.A. and its companion statute, the Labor-Management Reporting and Disclosure Act of 1959,²⁰ have failed to make any measurable impact on the financial abuses which prompted their enactment. It can be said, however, that the very creation of a new bureaucracy to administer the W.P.P.D.A. was the first step toward federal assumption of responsibility for the integrity of pension plan assets. The staff of the Labor-Management Service Administration of the Department of Labor, despite the limitations on its jurisdiction, is at least

¹⁵ 18 U.S.C. §§ 1 et seq. (1970).

¹⁶ *Id.* § 644.

¹⁷ *Id.*

¹⁸ Office of Labor-Management and Welfare Pension Reports.

¹⁹ Hereinafter referred to as W.P.P.D.A. Act of Aug. 28, 1958, Pub. L. No. 85-836, 72 Stat. 997.

²⁰ 29 U.S.C. §§ 401 et seq. (1970).

in a position to obtain the kinds of preliminary information on which a criminal investigation can be predicated.

A. *The Welfare and Pension Plans Disclosure Act of 1958*

Congressional interest in welfare and pension plan problems began with hearings in 1953 by the House of Representatives and a more comprehensive investigation in 1954 by the Senate. During the 83rd Congress, a special subcommittee chaired by Senator Ives of New York was created for the purpose of conducting a study of the characteristics of jointly administered welfare funds set up as the result of collective bargaining agreements. The committee's interim report,²¹ submitted on January 10, 1955, recommended consideration of a federal disclosure act and the extension of the congressional investigation to cover all types of benefit plans. In February, 1955, the Ives Committee, recreated under the chairmanship of Senator Douglas of Illinois, began hearings centering on alleged mismanagement in the welfare plans of the Laundry Workers' International Union and Local 52 of the Painters, Cleaners and Caulkers' Union, issuing a second interim report on July 20, 1955.²² The Ives Report contained an analysis of twenty-seven jointly administered funds and concluded that thirteen funds could be characterized as having questionable management practices, six as grossly mismanaged, and seven as well managed.²³ The final Douglas Committee report²⁴ went into considerable detail in its case studies, highlighting the general abuses uncovered by the investigation.

A primary concern of the Committee was the payment of highly inflated commissions and fees by insurance companies. The Douglas Report described the activities of Louis B. Saperstein, an agent, who in 1950 approached the Security Mutual Life Insurance Company to underwrite the group insurance plan for the Laundry Workers in return for payment of the commission called for in his previously negotiated lifetime contract. This commission, a flat ten percent first-year renewal fee, produced for Saperstein in the period from April 1, 1950, to September 30, 1953, a total of \$262,500, although under the normal decremental scale applicable to most insurance sales, he would have received approximately

²¹ Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess., First Interim Report (1955) [hereinafter referred to as the Ives Report].

²² Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess., Second Interim Report (1955).

²³ Ives Report, *supra* note 21, at 10-19.

²⁴ S. REP. NO. 1734, 84th Cong., 2d Sess. (1956) [hereinafter referred to as the Douglas Report].

\$18,125.²⁵ When Security informed Saperstein in 1953 that it would have to reduce its commissions, Saperstein simply switched carriers and collected an additional \$91,000 until the new insurer finally cancelled the arrangement.²⁶ The Committee found this practice of switching carriers to be extremely widespread,²⁷ and indeed elicited testimony from the officer of one company to the effect that it paid to cancel and reissue an existing policy, thus paying two first-year commissions, rather than risk losing the business to another carrier.²⁸

More generally the Douglas Report showed a clear pattern of abdication of responsibility by the employer, inadequate controls over disbursement of plan assets, excessive administrative costs, and failure to make financial reports either to contributing employers or to beneficiaries. All of this resulted in the passage of Senate Bill 2888²⁹ on April 28, 1958. This bill required the registration of a broad range of benefit plans and the filing of annual reports. In addition, it provided that the Secretary of Labor could prescribe reporting forms, issue rules, regulations, and interpretations of the statute, investigate failures to comply with registration and reporting requirements, bring suit to enjoin violations, and refer possible criminal cases to the Department of Justice. Furthermore, the bill made it a felony to willfully fail to comply with the statute, to give or receive kickbacks, to make false entries in or to destroy plan records, and to embezzle the funds of any plan covered by the Act. It also made it illegal for anyone to serve as a trustee, officer, or employee of a plan while deprived of the right to vote in a state election as the result of any conviction.

The Senate, faced with a wide variety of abuses, most of which involved self-dealing on the part of plan officers and trustees, sought to deal with the problem by providing for disclosure of transactions to those for whose benefit the various plans were supposed to be administered. The Senate assumed that the beneficiaries would then be able to take corrective action on their own behalf. There seems to have been no particular thought given to the possibility of providing for governmental control over the actual management of the plans' daily affairs. On the contrary, there was great concern expressed about the risk of unduly burdening the operation of the benefit plan system. The essence of the proposal is set out in the following passages from the debate on 2888:³⁰

²⁵ *Id.* at 30.

²⁶ *Id.* at 36; 104 CONG. REC. 7204 (1958).

²⁷ *Id.* at 37.

²⁸ *Id.*

²⁹ S. 2888, 85th Cong., 2d Sess. (1958).

³⁰ 104 CONG. REC. 7051-2 (1958).

Senator John F. Kennedy: One of the major objectives of the proposed legislation is to deter abuses. We hope to deter any unscrupulous union officials from dominating and mismanaging plans which involve numerous employer contributors with limited authority. However, . . . we cannot ignore this major portion of all plans where the employer has the complete authority over the finances and destiny of the employees' economic security. . . .

. . . .

The inadequacy of standards and safeguards to protect the diffused interests and equities of some 80 million employee beneficiaries of these plans logically calls for legislation that will bring the facts with respect to their financing out in the open. A one-operation, self-policing Federal disclosure, coordinated with the States' interests, as proposed by S. 2888, would appear to be the simplest and most economical method of accomplishing this. To do less could be to encourage an economic Frankenstein.

And further along the identical line:

Senator Douglas: The principle the Senator from Massachusetts has advanced, and which lies at the basis of this effort, is that sunlight is a great disinfectant; that if there is proper publicity regarding the affairs of a welfare or pension fund and its management, then the temptation for trustees to abuse their office will be greatly diminished.

. . . .

I have been mystified for many years as to why so many employers and employers' associations and insurance companies . . . have opposed a measure such as this one, because it seems to me that if these programs are being honestly conducted, nothing whatsoever is to be feared from a disclosure of the facts of investment and the expenses of administration.

In fact, I would think the ethical insurance companies—which I believe outnumber the unethical insurance companies—would welcome a program such as this one, because it will restrain competitors who are less scrupulous; and where the administrative costs are too high, or where rebates or kickbacks are being paid, they will be eliminated; and therefore the ethical companies will be freed from the unfair competition by companies which engage in such practices.⁸¹

Perhaps only the benefit of hindsight makes Senator Douglas' statement concerning the opposition of insurance companies and employers seem naive, although one would like to think that the Senator spoke with tongue in cheek. Looking back on the history of enforcement under W.P.P.D.A., even after its amendment in 1962,⁸² it might be more accurately suggested that other reasons existed why neither group had cause for concern—the former because the Act posed no threat to their conduct of business as usual, and the latter because there was nothing in the Act which required them to abandon their posture of blissful ignorance.

⁸¹ *Id.* at 7053.

⁸² Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35.

In any event, Senate Bill 2888,³³ although ineffectual, was far too strong for the members of the House. On July 28, 1958, the House Committee on Education and Labor reported out of committee House of Representatives Bill 13507,³⁴ which provided only for the filing of financial reports with the Secretary of Labor, giving him nothing more than custodial powers. The members of the House seemed to be unimpressed with their own investigation and with the catalogue of abuses uncovered by the Douglas Committee, and after over four years of study professed themselves unprepared to venture beyond a minimal disclosure system. A few passages from the debate³⁵ will suffice to depict the attitude of the House.

Congressman Madden: Unfortunately, a relatively small number of so-called labor leaders have been either negligent or dishonest with their membership by dissipating, misappropriating, or through unsound investments jeopardize [sic] the funds which are established for the purpose of protecting the future welfare and security of their organization's membership.

. . . The participants and beneficiaries of these funds, if they are familiar and acquainted with the true status of the administration thereof will be sufficient protection to keep these funds intact and solvent for the purposes for which they are originally intended.

Congressman Lane: H.R. 13507 represents a careful approach toward correction of a difficult problem.

It is moderate in tone, recognizing and avoiding the danger of reacting in anger and going to such extremes by punitive action that the cure would be worse than the complaint.

I think that this bill is admirable in its restraint.

. . . .

It avoids the creation of a top-heavy bureaucracy to enforce compliance.³⁶

Congressman Teller: . . . Our bill was the result of the effort to cut down the scope of legislation in this brand new field, where we lack so much information—to limit the measure of our present legislation to matters which we understood, leaving for further investigation many of the regulatory subjects which have to be dealt with.³⁷

The Senate bill had little success in the House and was passed on August 6, 1958, only after it had been amended to conform almost exactly to H.R. 13507.³⁸ The bill then went to a conference committee and a somewhat sheepish Senator John F. Kennedy was forced to report to the Senate that, in order to obtain any bill at all, it had been necessary for the Senate conferees to give way on vir-

³³ S. 2888, 85th Cong., 2d Sess. (1958).

³⁴ H.R. 13507, 85th Cong., 2d Sess. (1958).

³⁵ 104 CONG. REC. 16,419 (1958).

³⁶ *Id.* at 16,420.

³⁷ *Id.* at 16,421.

³⁸ *Id.* at 16,444.

tually all important points.³⁹ The bill was then reluctantly passed by the Senate on the theory that it constituted "a step—even though a creep in the right direction."⁴⁰ Its inadequacies were noted by President Eisenhower at the signing ceremony when he stated, "Congress has failed to respond effectively to the pleas for action in this field, and I am sure that the public is as disappointed . . . as I am,"⁴¹ and closed by calling for extensive amendments at the next session of Congress.

B. *The 1962 Amendments*

Unfortunately, it was not until four years later that the statute received its much needed facelift. The delay is perhaps explainable by the fact that the 86th Congress was preoccupied with passage of the Labor-Management Reporting and Disclosure Act of 1959, but in any event it was not until 1961 that the newly elected Kennedy administration proposed amending legislation which was introduced in the form of three bills, H.R. 7234,⁴² H.R. 7235⁴³ and S.B. 1944.⁴⁴ Hearings were held in May and June of 1961, with the House taking the lead, holding seven days of hearings to the Senate's one. Virtually identical bills⁴⁵ were reported out of committee and adopted by each House, with the conference report⁴⁶ being approved almost immediately. The bill was signed into law on March 20, 1962.⁴⁷

The hearings leading up to passage of the Act⁴⁸ consisted, in the main, of a repetition of the abuses uncovered earlier by the investigation of the Douglas Committee. Senator Douglas read summaries of his earlier report into the record before both the House⁴⁹ and Senate⁵⁰ committees, this report being followed by some general testimony to the effect that similar misdeeds continued to be prevalent in the years since passage of the original statute.⁵¹ However, there was still no consideration given to the

³⁹ *Id.* at 17,963.

⁴⁰ *Id.* at 17,964.

⁴¹ N.Y. Times, Aug. 30, 1968, at 16, cols. 1 and 2.

⁴² H.R. 7234, 87th Cong., 1st Sess. (1961).

⁴³ H.R. 7235, 87th Cong., 1st Sess. (1961).

⁴⁴ S. 1944, 87th Cong., 1st Sess. (1961).

⁴⁵ H.R. 8723, 87th Cong., 2d Sess. (1962); S. 2520, 87th Cong., 1st Sess. (1961).

⁴⁶ 108 CONG. REC. 3809 (1962).

⁴⁷ *Id.* at 5375.

⁴⁸ Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35.

⁴⁹ *Hearings on H.R. 7234, 7235 and 7040 Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 1st Sess. at 340-397 (1961) [hereinafter referred to as *1961 House Hearings*].

⁵⁰ *Hearings on S. 1944 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 87th Cong., 1st Sess. at 47-105 (1961).

⁵¹ *1961 House Hearings* at 15.

creation of a full-scale regulatory system, and Congress continued to rely optimistically on disclosure as the great "disinfectant." This position can be explained by recognizing that the senators who fought for S.B. 2888 in 1958 must have believed that, if their bill had passed, these evils would have been irradiated. Furthermore, the congressmen who supported the ineffective bill which ultimately became law must have been sufficiently embarrassed to have concluded that their best course of action would be to acquiesce, even if belatedly, in the now proven wisdom of the "other body." But for whatever reason, the theory of the law was the same: tell the beneficiary of the plan what the people in control of his money are doing, and he will protect himself.

The 1962 amendments⁵² recreated in somewhat more sophisticated form the disclosure provisions of S.B. 2888,⁵³ by providing for relatively detailed reports on income, expenditures, investments, potential conflicts of interest through purchases of stock in or loans to employer companies, and administrative fees and insurance commissions. More importantly, the Act made the Secretary of Labor something more than a custodian, by giving him the power to investigate violations of the reporting requirements, to prescribe mandatory forms for reporting, and to refer potential criminal violations to the Department of Justice. These violations included not only the willful failure to comply with the reporting provisions but violations of three newly enacted sections of the federal criminal code.⁵⁴

Section 664⁵⁵ is a general theft statute modeled directly after Section 501(c)⁵⁶ of Title 29, which had been enacted as part of the Labor-Management Reporting and Disclosure Act of 1959.⁵⁷ In general, it prohibits any misappropriation of benefit plan funds covered by the Act without regard to the troublesome common law distinctions among larceny-type offenses. Section 1027⁵⁸ makes it

⁵² Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35.

⁵³ See note 22, *supra*.

⁵⁴ 18 U.S.C. §§ 664, 1027, 1954 (1970).

⁵⁵ 18 U.S.C. §§ 644 (1970) reads:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

As used in this section, the term 'any employee welfare benefit plan or employee pension benefit plan' means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act.

⁵⁶ 29 U.S.C. § 501(c) (1970).

⁵⁷ Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519.

⁵⁸ 18 U.S.C. § 1027 (1970) reads:

Whoever, in any document required by the Welfare and Pension Plans Dis-

a felony to submit false reports to the Secretary of Labor, to make false entries in the books of a plan, and to conceal facts required to be disclosed or necessary to verify the plan's reports. It replaces the provision of the original Act⁵⁹ which attempted, with questionable legality, to make the general false statement statute,⁶⁰ applicable to the submission of false reports. Section 1954⁶¹ prohibits certain specified officers and employees of any benefit plan, any employer whose employees are covered by the plan, any labor organization whose members are covered by the plan, and any organization providing services to the plan from receiving kickbacks with the intent to be influenced in connection with their administrative duties. The statute also makes it an offense to pay a kickback to any of the named persons.

The extent and shortcomings of these provisions will be discussed in the context of the previously cited "case histories."⁶²

closure Act (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be certified, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

⁵⁹ Act of Aug. 28, 1958, Pub. L. No. 85-836, § 9, 72 Stat. 1002.

⁶⁰ 18 U.S.C. § 1001 (1970).

⁶¹ 18 U.S.C. § 1954 (1970) reads:

Whoever being—

- (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
 - (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
 - (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
 - (4) a person who, or an officer, counsel, agent or employee of an organization which, provides benefit plan services to such plan
- receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than \$10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) 'any employee welfare benefit plan' or 'employee pension benefit plan' means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act, as amended, and (b) 'employee organization' and 'administrator' as defined respectively in section 3(3) and 5(b)(1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended.

⁶² See text accompanying notes 12-14, *supra*.

1. *Section 1954.* Section 1954,⁶³ the statute under which Berger and his associates in the enterprise described above⁶⁴ were convicted, seems on its face to be a simple and effective anti-kickback law; indeed, the facts in *Berger* fit neatly into its provisions to the extent that all that is really needed for conviction is a way of developing the relevant information.⁶⁵ There is little conceptual difficulty in holding that one who pays or conspires to pay money to a trustee of a welfare or pension fund has violated the law; nor is there any particular difficulty in reaching a similar conclusion when the payment is made to an accountant who "established an agency relationship" with a fund by "rendering advice . . . on a regular basis, including giving . . . advice regarding the financial status of potential borrowers."⁶⁶ Beyond these specific facts, however, are the gray and troublesome areas left unresolved by the statute.

Section 1954⁶⁷ prohibits any type of payment either because of, or with the intent to, influence the actions, decisions, or duties of a class of persons having a specified relationship to particular organizations. This class consists of administrators, officers, trustees, custodians, counsel, agents, and employees. Yet, only one of those terms—administrator—is defined. It is clear, however, from a statement made by Senator MacNamara, chairman of the Senate Labor Subcommittee, that Congress did not intend to restrict the class to "fiduciaries" in the narrow sense of the term:

What we deal with here is more than technical and goes beyond those considerations which are termed as 'fiduciary' and the like.

This involves the hopes and expectations of the majority of our people.

A trust fund depleted by connivance and corruption can shatter the lives of all too many people.

I trust we will provide the means to wipe out such individual tragedy by the enactment of this bill.⁶⁸

But, even if a liberal approach to statutory interpretation is taken, serious questions arise with respect to the reach of the prohibition⁶⁹ as it affects its two broadest categories—"counsel" and "agent." As to the former, legislative history gives very little indi-

⁶³ 18 U.S.C. § 1954 (1970).

⁶⁴ See note 12, *supra*.

⁶⁵ It is noteworthy in terms of this very special problem of information gathering that *Berger, Russo*, and a number of other cases arising in the Southern District of New York were "made" with the help of Herbert Itkin, a man who was on the inside of a wide range of transactions involving benefit plan loans and kickbacks.

⁶⁶ *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310, Jan. 11, 1972.

⁶⁷ 18 U.S.C. § 1954 (1970).

⁶⁸ 108 CONG. REC. 1924 (1962).

⁶⁹ The prohibition spoken of is that of 18 U.S.C. § 1954 (1970).

cation as to whether Congress intended to refer to legal counsel or intended to use the broader meaning of "one called in to advise."⁷⁰ It can be assumed that, since Congress could have used some specific term such as "attorney" if it meant only legal counsel, the broader meaning was intended. In fact, this was the position taken by the trial judge in *United States v. McCarthy*,⁷¹ when he charged the jury that the statute covered "counsel in the broader sense of an advisor, one who recommends a course of action to the Fund."⁷² On appeal, the Second Circuit found it unnecessary to reach the question by concluding that the proof established the defendant's agency status.⁷³

Although classical agency theory seems to rely on the power of the purported agent vis-à-vis third parties to determine whether the necessary relationship exists,⁷⁴ the courts have not been uniform in taking that approach when dealing with Section 1954.⁷⁵ As noted above, the court of appeals in *Russo* considered the services which the "agent" performed for the fund without reference to whether or not he represented the fund in dealing with those who were seeking loans. The court did not discuss the trial judge's instructions although the instructions were explicit in detailing the facts upon which the jury could rely in determining whether the defendant was an agent.⁷⁶

⁷⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

⁷¹ Crim. No. 68-467 (S.D.N.Y. 1970), *aff'd sub. nom.*, *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310, Jan. 11, 1972.

⁷² Transcript of *United States v. McCarthy*, *supra* note 71, at 1692.

⁷³ See *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971) *cert. denied*, 40 U.S.L.W. 3310, Jan. 11, 1972.

⁷⁴ See 1 F. MECHEM, AGENCY § 36 (4th Ed. 1952); RESTATEMENT (SECOND) OF AGENCY § 12 (1958).

⁷⁵ 18 U.S.C. § 1954 (1970).

⁷⁶

By agent I mean one who by the authority or direction of another person or firm or group as principal undertakes to transact business or manage one or more aspects of the affairs or business of the principal and render an account or report to that principal. Put simply, an agent is a deputy appointed by his principal to assist in bringing about a business deal or business relationship between the latter and third persons or firms. Thus if you find from the proof beyond a reasonable doubt that in respect to the loan to the Hospital Holding Corporation, at least, Wenger in his capacity as auditor of the Fund was engaged by the trustees of the Fund to examine financial statements of Mr. Giamonco and to give his advice and professional opinion of them as a basis for the contemplated personal guarantee of the loan by Giamonco and you further find that as auditor Wenger stood ready to and actually gave financial advice, as sought by the trustees of the Fund, then you would be entitled to find that he was a counsel or agent, as required by the statute and as contended by the government.

Incidentally, in this connection I point out that it is not necessary that you find from the proof that Wenger was the one who had the authority to and actually did make the final decision on the approval of the loan to Hospital Holding Corporation. It is sufficient under the law, in other words, if you determine that he was in a position to give evaluation, advice and recommendations which, though not controlling in the final sense would have

In the first case to reach the courts under Section 1954, the issue of agency was dispositive, with the result unfavorable to the government. In *United States v. Marroso*,⁷⁷ the defendant, a broker who held himself out to prospective borrowers as having influence with the trustees of a pension fund, was charged with violating Section 1954 by accepting finders fees while an "agent" of the fund. The trial judge granted Marroso's motion for acquittal, holding that, despite representations made concerning his powers as an agent, there had been no proof of any action on the part of the fund which could have been said to amount to even a minimal consent to the agency. Although it is true that this sort of manifestation would be necessary to bind the fund to Marroso's representations on its behalf, it may properly be asked whether the same rule ought to apply in determining whether Marroso was guilty of accepting a kickback. If he knowingly held himself out to borrowers as being able to influence the fund to grant loans, and in fact did play a role in securing the loans, should he then be able to defend against a charge that he violated the statute by saying that he was just fooling? Would the court, for example, have looked behind Marroso's statements if the borrowers had been on trial for making a prohibited payment? In a practical sense, of course, one in Marroso's position is an agent for both the fund and the borrower, and this dual status raises the single most difficult problem in interpreting Section 1954.⁷⁸

some influence on the final decision or decisions. Transcript of *United States v. McCarthy*, *supra* note 71, at 1692-93.

⁷⁷ 250 F. Supp. 27 (E.D. Mich. 1966).

⁷⁸ Section 1954 contains the following proviso:

Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan. 18 U.S.C. § 1954 (1970).

What, in the last analysis, does this proviso mean? At first blush, it would seem to be intended to cover a situation in which someone outside the plan pays money to an officer or trustee of the plan as a legitimate payment for services; but this cannot be so, for the mind boggles when asked to conceive of a situation in which a borrower seeking a loan or a banker seeking deposits would be paying for services performed "in the regular course of [the payee's] duties." Alternatively, perhaps the proviso is intended to make certain that the receipt of salary or other compensation from the plan or one of its officers, administrators, agents, or counsel is not held to be a violation, but again it must be asked whether the case can be imagined in which such a payment would be made to influence the recipient in the conduct of his duties. It may be that a corrupt officer could arrange to raise the salary of a fellow officer in order to convince him to participate in a fraud on the plan, but the likelihood of such a situation arising does not seem sufficiently high to have called for a special exception, particularly when, even without the proviso, the payment of bona fide salary would seem by its own force to fall outside the statutory prohibition.

On the other hand, one can posit a case in which a financial consultant to the

The problem of dual agencies arises most frequently in connection with the role of the money-finder, who, appearing in a variety of guises, is a key member of the benefit-plan loan system. A money-finder performs the vital function of bringing together the borrower and the lender, but in doing so must tread a very thin line between the legitimate and the illegitimate. It must be his stock in trade to develop continuing relationships with lending institutions, and he must be able to advertise his special abilities. He can be of as much service to the benefit plan in finding secure investments as he can be to the borrower in finding favorable loans. However, he runs the serious risk of confusing his loyalties: when he accepts his fee, is he being paid for services rendered or is he taking a payoff?

The range of possible variations in the relationship among broker, borrower, and lender is a broad one, but, for analytical purposes, four categories are readily discernible:

1. The borrower's attorney (Levy in the *Berger* case)⁷⁹ or personal financial advisor with a continuing relationship to him.
2. The independent consultant/money broker who is hired by the borrower for a fee contingent on the obtaining of a loan, either with no particular lender in mind or with some specific lender in mind but with no reliance on any extraordinary relationship between broker and lender.
3. The independent consultant/money broker who has a special and continuing relationship with the lender as advisor, accountant (as in the *Russo* case⁸⁰), or attorney and is hired by the borrower because of that relationship.
4. The plan's financial consultant, attorney, or accountant who is actually paid by the plan.

plan is also hired by a prospective borrower to represent him and is paid a fee for arranging a loan. It cannot, however, be contended that the proviso would legitimate such a transaction even if the fee paid by the borrower were characterized as bona fide payment for services in the course of the recipient's duties as an agent of the fund, and second, and more importantly, such a reading of the proviso would wholly emasculate the statute. One can only conclude, then, that because the statute is drafted in terms of a general prohibition on the receipt of payment and makes the giving of payment an offense only if the receipt is prohibited [compare Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1970), which defines the offense in terms of proscribed payments and makes the legality of receipt hinge on the legality of the payment] someone must have thought that it was necessary to spell out the exception [compare again the structure of Section 302] to ensure that plan officials could receive their pay checks. But, as has been indicated, such concern seems to be entirely unnecessary, and it can only be hoped that a concerted effort to ignore the proviso will meet with the support of the courts should the question of its meaning ever be raised.

⁷⁹ See note 12, *supra*.

⁸⁰ *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310, Jan. 11, 1972.

Situations one and four above present no problem; it is proper for the borrower to pay the members of the former class and improper for him to pay the members of the latter. Situations two and three make up the gray area: it is probably permissible to pay members of the second class and probably impermissible to pay members of the third, but the lines between the two are blurred at best.

The *Marroso*⁸¹ opinion, with its application of pure agency theory, suggests that the otherwise independent broker becomes a member of the prohibited class only if there is some formal arrangement between him and the plan; not necessarily a contract or the giving of compensation, but at least an acknowledgement by the plan of the authority of the broker to act on its behalf is arranging loans. The *Russo*⁸² opinion, on the other hand, suggests that the independent entrepreneur may become an agent within the meaning of the statute if he becomes involved in a pattern of activity which encompasses advice to or the performance of other services for the plan. The difficult questions for the prosecutor, who makes the preliminary judgment, concern the quantum and character of the evidence necessary to establish a violation: for example, can an agency relationship established for one loan be presumed to continue even without specifically renewed authority, or can the relationship be established by proof of a pattern of approved loans proposed by a particular broker?

Suppose, for example, that a broker proposes to the trustees of a pension plan which he represents that he will make available to the trustees his expertise in evaluating potential borrowers and will bring profitable investment opportunities to the plan in return for the authority to hold himself out as a consultant to the plan and discloses that he intends to seek his payments only from the borrowers whose loans he arranges. Is this broker an agent of the plan who should be prohibited from receiving the payments he intends to demand from the borrowers? No legislative history or court decision affords any assistance in answering the question, although the answer must be "yes" if the statute is to be other than a dead letter.

The purpose of Section 1954⁸³ is to ensure that the trustees', officers', and employees' judgment be made solely on the basis of what is in the best interests of the plan's beneficiaries. Any payment which has a potential impact on that judgment is presumptively improper. If the trustees rely on the advice of any person in

⁸¹ *United States v. Marroso*, 250 F. Supp. 27 (E.D. Mich. 1966).

⁸² *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3310, Jan. 11, 1972.

⁸³ 18 U.S.C. § 1954 (1970).

connection with their loan decisions, they are entitled to have that advice rendered on the merits of the application and not because the advisor has been paid by the applicant. Even if they know that he has been paid, they are placed in the position of relying on biased advice—a reliance which itself may be in violation of their fiduciary responsibility.⁸⁴ Effective enforcement of the law in this area requires that the prosecutor take the position, at least at the investigative stage, that unless a broker or consultant comes to the plan as a disclosed partisan representative of the borrower, he presumptively violates Section 1954⁸⁵ by accepting a payment with the intent to be influenced thereby in any of his actions, decisions, or duties.

This proposition is intentionally framed in the negative, for it is incumbent on the prosecutor under such circumstances to take as unyielding a line in interpreting the law as the courts will permit. Any continuing relationship between the financial consultant and the plan requires him to prosecute the consultant who accepts payment from the borrower. It is less clear what is required when the evidence shows only that the consultant misrepresented his status in dealing with an isolated loan application; however, it is easy to envision a case where a plan officer or trustee recommends the consultant to the plan as a purportedly independent advisor, even though the consultant is, in fact, being paid by the borrower. Under those circumstances a *prima facie* violation of the statute seems to be present.⁸⁶

It is because the prosecutor can have a real impact in this type of situation that he must act with particular care. The prosecution of embezzlement cases will have very little effect on the number of defalcations which may occur, but because the brokers who make it their business to deal with benefit plans on behalf of borrowers are not a large group, the prosecution of one of them for conduct which up to that time had gone unpunished is likely to persuade the others to re-examine their conduct. Normally, under other statutes this function would be performed by administrative or civil injunctive action, a mechanism much better suited to the drawing of fine distinctions than the criminal process. It is very difficult for the prosecutor to make even the preliminary decision to seek an indictment in cases where he determines that a prospective defendant's

⁸⁴ *Dept. of Labor, Administration of the Welfare and Pension Plans Disclosure Act*, Calendar Year 1971, at 6 (1972) [hereinafter referred to as the 1971 W.P.P.D.A. Report].

⁸⁵ 18 U.S.C. § 1954 (1970).

⁸⁶ Of course, if it can be proven that the plan officer participated in receipt of the kickback, the problem is resolved by charging the consultant as a payor.

conduct was improper but where he can anticipate a defense based on the defendant's arguably reasonable belief that the statute did not encompass his activities. Moreover, it is even more difficult to explore these gray areas in a criminal trial when the government is forced to bear the burden of proving guilt beyond a reasonable doubt and a man's freedom and reputation are at stake.

2. *Section 664.* There are many ways of stealing money from a welfare or pension plan. One automatically thinks of the accountant who falsifies the books or forges checks and runs off with \$1000 for doctors' bills or \$50,000 to pay his bookie. But this type of theft, although obviously a problem, is by no means the greatest danger to the security of the plan. In the five years since surety companies have been required to file reports on their experience with the bonding of persons handling the funds of benefit plans,⁸⁷ only fifty-five such losses have been reported.⁸⁸ Even though that figure may not give a totally accurate picture of the incidence of theft,⁸⁹ it is at least indicative of the fact that direct stealing of plan assets is not by any means an overwhelming problem. Periodic internal audits and subsequent claims made on the sureties will serve to bring cases of simple theft to the attention of the Office of Labor-Management and Welfare Pension Reports (O.L.M.W.P.R.).⁹⁰ The real problem, and one to which there is no easy solution, is how law enforcement authorities can bring their efforts to bear on the much broader areas of misuse and misappropriation of plan assets.

There are opportunities for theft in three general areas of a plan's operation: collection of contributions, payment of benefits, and investment. In the first area, the plan's staff is charged with receiving the weekly or monthly payments made by the plan's members which, depending on the size of the plan, could total as much as several hundred thousand dollars a month. Whenever this kind of money flow is present, particularly in small, less organized health and welfare plans, there is room for larceny.⁹¹ The second

⁸⁷ 29 U.S.C. § 441 (1970).

⁸⁸ 1971 W.P.P.D.A. Report at 6.

⁸⁹ *Id.*: "Since dishonesty losses may remain hidden for many years, the W.P.P.D.A. bonding experience of the reporting surety companies to date may not be entirely representative."

⁹⁰ The Office of Labor-Management and Welfare Pension Reports is a branch of the Labor-Management Services Administration of the Department of Labor and is charged with receiving, examining, and making available for disclosure the reports required by the W.P.P.D.A., enforcing compliance with the Act, and issuing rulings and interpretations.

⁹¹ In *United States v. Moore*, 427 F.2d 38 (5th Cir. 1970), *cert. denied*, 400 U.S. 965 (1971), the defendant, executive secretary of an association of employers, was convicted on ten counts charging violations of 18 U.S.C. § 664. The association established a health benefit plan in the form of a trust which was to secure various types of insurance for the owners, partners, and employees of member firms. The defendant

area presents somewhat more sophisticated problems, for the danger here is that the plan's assets (whether welfare or pension) may be misused by having benefits paid to persons not entitled to them. This may involve anything from mere technical violations of the plan's regulations concerning eligibility to clear cases of payments to persons who have failed to keep up the required contributions, or who are total strangers to the plan. The third area is the most troublesome since misuse of funds can be easily concealed, violations are more complex, and it is frequently difficult to distinguish between criminal misuse and unwise judgments that may call only for civil redress.

In this area, the prosecutor's tools are fitted to the task. Section 664⁹² of Title 18 (with one exception identical to the embezzlement section⁹³ of the L.M.R.D.A.⁹⁴) is worded to avoid the difficulties encountered by the draftsmen of earlier larceny statutes—the fiduciary status of the embezzler and the requirement of an asportation in stealing, for example. It includes four methods of committing the statutory crime: embezzlement, stealing, abstraction, and conversion. These methods are intended to encompass every conceivable criminal taking and, in particular, the term “unlawful and willful conversion” has been held to reach “misuse or abuse of property [as well as] use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use”⁹⁵ The broad scope of this language affords the prosecutor the option to intervene in matters involving something other than classic theft offenses.

instructed an association employee, who was in charge of paying the monthly premiums out of the trust, to make the checks payable to the insurance company for more than the required amount. The insurance company issued refund checks payable directly to the association rather than to the trust, and they were negotiated by the defendant, who used the proceeds to pay his personal bills. In addition, the trustees authorized the payment of fees to the association far in excess of the administrative expenses incurred by it in servicing the insurance fund, and the excess was diverted to the personal benefit of the defendant. The court of appeals found that these facts, stipulated to at trial, were “amply sufficient,” *id.* at 42, to sustain the conviction.

⁹² 18 U.S.C. § 664 (1970).

⁹³ 29 U.S.C. § 501(c) (1970).

⁹⁴ Whereas 29 U.S.C. § 501(c) can only be violated by an officer or employee of a labor organization, Section 664 (18 U.S.C.) uses the term “whoever” in describing the class of potential defendants. The legislative history does not discuss the reasons for this change, but the broader language would encompass, for example, the burglary or robbery of a plan's assets by a total stranger. It is, however, unlikely that any large number of cases will arise in which one, who is not otherwise connected with the fund, commits one of the more sophisticated forms of larceny at which the statute is primarily directed. One benefit should be noted: the use of “whoever” does eliminate troublesome proof problems which have arisen under Section 501(c) where the relationship of the thief to the organization is uncertain.

⁹⁵ *Morrisette v. United States*, 342 U.S. 246, 272 (1952), construing 18 U.S.C. § 641 (1970).

When applying Section 664⁹⁶ to the facts outlined in the second case history described above,⁹⁷ the pertinent questions are whether any unlawful conversion occurred, and, if so, when it occurred. If it is assumed that the businessman was engaged in illegal or illegitimate manipulation of his company's stock, a strong argument can be made that the mere purchase of the stock by the plan was an unlawful conversion. In other words, the businessman by committing the plan to the bank obligation, has burdened its assets for a purpose wholly removed from the use authorized in the trust agreement. A trust agreement will, normally, contain a general authorization to the trustees to invest the assets of the plan, and the trustees should not be held criminally liable⁹⁸ for making investments which are either risky when viewed before the fact or which later turn out to be damaging to the plan. However, where the motivation for the investment can be shown to be the benefit of a third party or, as in the case at issue, that of a trustee or an officer of the parent employer, what may have been merely imprudent begins to take on a criminal aspect.

As a practical matter, however, the prosecutor has another alternative. Faced with this problem of investment by a benefit plan in the stock of the employer, he can take a much narrower approach. Rather than rely on the theory that the conversion occurred by virtue of the purchase itself, it is possible for the prosecutor to proceed without pushing the statute to its farthest limits by charging that the businessman unlawfully converted the amount of interest the plan paid without reimbursement (\$32,000 in the situation in the second case history).⁹⁹ At trial, it will still be necessary to show that the purpose of the entire scheme was to assist in the improper manipulation of the company's stock, that the plan was forced to buy the shares at a price above that which would have prevailed had the stock been bought and sold on the open market, and that the defendant was instrumental both in causing the purchase to be made and in causing the plan to bear the expense of the loan. By adopting this more limited stance, the prosecutor can frame the case in terms of actual money lost—a concept more closely related to the typical theft offense and more easily grasped by both court and jury than the somewhat more amorphous “misuse” of plan assets.

These examples are typical of the kinds of judgments the prosecutor must make when dealing with a broad statute which has

⁹⁶ 18 U.S.C. § 664 (1970).

⁹⁷ See text accompanying note 12, *supra*.

⁹⁸ Here civil redress is the proper remedy.

⁹⁹ See text accompanying note 12, *supra*.

not yet been thoroughly explored by the courts and which may support an expansive interpretation of federal jurisdiction despite being rooted in basic common law concepts of unlawful taking. Although the prosecutor may wish to see the courts confirm his broad view of the statute, there is little point in forcing an unnecessary confrontation when a simpler alternative is available. The problem may have to be faced when the plan makes an investment for the purely personal benefit of a trustee but does not sustain a loss or, indeed, actually makes a profit. However, the problem need not be met until the facts leave no alternative. Should the prosecutor with sufficient evidence in such a case take the position that the defendant subjected the plan's assets to a serious risk and indict him when the circumstances may arguably call only for administrative action? Of course, he must always ask himself whether, as a practical matter, he will be able to convince a jury of the seriousness of the offense if he cannot show a loss to the plan, but the ultimate decision goes beyond that point to the more serious question of whether it is appropriate, in the absence of some provision for regulatory action, to reach that kind of case through the criminal process.

Some of the difficulties inherent in this decision-making process will be relieved, if not eliminated, should Congress enact proposed fiduciary legislation. Both the administration bill¹⁰⁰ and Senator Javits' bill¹⁰¹ provide for civil actions by the Secretary of Labor to enjoin violations of the statute as well as actions by participants in the plan to recover benefits due them. Under that scheme, the United States Attorney would, in large measure, revert to a role which is more appropriate for him—that of prosecutor rather than regulator. In the case of the \$32,000 interest loss,¹⁰² indictment under Section 664 would continue to be the proper course; in the case in which no monetary loss occurs, the prosecutor could, with a relatively clear conscience, leave to the Secretary of Labor the task of enforcing the statutory limitations on investment in stock of the employer's corporation.¹⁰³

¹⁰⁰ S. 3024, 92d Cong., 1st Sess. (1971).

¹⁰¹ S. 2, 92d Cong., 1st Sess. (1971).

¹⁰² See text accompanying note 12, *supra*.

¹⁰³ Section 14(c)(4)(A) of S. 3024 excepts the following transaction from the general prohibition of Section 14(b)(2) against purchasing the property of a party in interest:

purchasing on behalf of the fund any security which has been issued by an employer whose employees are participants in the plan under which the fund was established or a corporation controlling, controlled by, or under common control with such employer: *Provided*, That the purchase of any security is for no more than adequate consideration in money or money's worth: *Provided further*, That if an employee benefit fund is one which provides primarily for benefits of a stated amount, or an amount determined by an em-

C. Section 302 of the Taft-Hartley Act

Section 302¹⁰⁴ of the Labor-Management Relations Act of 1947¹⁰⁵ (popularly known as the Taft-Hartley Act)¹⁰⁶ was enacted

ployee's compensation, an employee's period of service, or a combination of both, or money purchase type benefits based on fixed contributions which are not geared to the employer's profits, no investment shall be made subsequent to the enactment of this amendment by a fiduciary of such a fund in securities of such an employer or of a corporation controlling, controlled by, or under common control with such employer, if such investment, when added to such securities already held, exceeds 10 percent of the fair market of the assets of the fund. Notwithstanding the foregoing, such 10 percent limitation shall not apply to profit-sharing, stock bonus, thrift and savings or other similar plans which explicitly provide that some or all of the plan funds may be invested in securities of an employer, or a corporation controlling, controlled by, or under common control with such employer, nor shall said plans be deemed to be limited by any diversification rule as to the percentage of plan funds which may be invested in such securities. Profit-sharing, stock bonus, thrift, or other similar plans, which are in existence on the date of enactment and which authorize investment in such securities without explicit provision in the plan, shall remain exempt from the 10 percent limitation until the expiration of one year from the date of enactment of this Act.

¹⁰⁴ Section 302 of the Labor Management Relations Act of 1947 is now codified as 29 U.S.C. § 186 (1970).

¹⁰⁵ Section 302, as amended, now 29 U.S.C. § 186 (1970), provides, in pertinent part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

....

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of

as a response to the efforts of John L. Lewis to secure from the coal industry an agreement calling for a fixed amount per ton of coal

business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee group deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101 to 115 of this title.

108 Act of June 23, 1947, ch. 120, 61 Stat. 136.

mined to be contributed to a pension fund¹⁰⁷ administered solely by the United Mine Workers. The statute prohibits any payment from an employer to a representative of his employees and provides that willful violations of its provisions are to be punished as misdemeanors.¹⁰⁸ The regulatory aspects of the statute are contained in a long list of exceptions to the general prohibition, one of which provides that payments can be made into trust funds set up to provide health and pension benefits so long as the trust is "for the sole and exclusive benefit of the employees,"¹⁰⁹ the detailed basis for the payments is set out in a written agreement between employer and employee representatives, and the trust agreement provides for an annual audit, the results of which are to be made available to the beneficiaries and other interested persons. The United States District Courts have jurisdiction to enjoin violations of the statute.¹¹⁰

Because Section 302 was drafted as a criminal statute and because its opening paragraphs deal with the serious problem of bribery of labor union officials, enforcement is entrusted to the Department of Justice.¹¹¹ However, this means that the prosecutor, in addition to bearing the responsibility which is properly his—that of investigating and prosecuting cases involving payoffs by employers to representatives of their employees, is charged with enforcing a law designed to regulate the structure and operation of welfare and pension plans. This is the classic example of the problem discussed earlier; for it is obvious that criminal prosecution is not the appropriate tool for making difficult decisions regarding the interpretation of complex statutory provisions. The great majority of Section 302(c)(5)¹¹² violations will occur because of inadvertence or reasonable disagreement over the effect of the restrictions. It makes no sense, either as a matter of efficient administration or as a matter of simple justice, to subject either employer or union to criminal penalties for what are essentially technical violations, particularly when the Department of Justice will not, as a matter of policy and because of statutory restrictions,¹¹³ advise private parties concerning the legality of their conduct.

¹⁰⁷ See 92 CONG. REC. 4892-94 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. at 52 (1947).

¹⁰⁸ 29 U.S.C. § 186 (1970).

¹⁰⁹ 29 U.S.C. § 186(c)(5) (1970).

¹¹⁰ *Id.* § 186(e).

¹¹¹ Investigations under section 186 are most often conducted by the Federal Bureau of Investigation and prosecutions are conducted by the United States Attorneys under the supervision of the Criminal Division of the Department of Justice.

¹¹² 29 U.S.C. § 186(c)(5) (1970).

¹¹³ 28 U.S.C. §§ 511, 512, and 513 provide that the Attorney General may advise the President, the heads of executive departments, and the Secretaries of military departments.

The provisions of Section 302(e)¹¹⁴ do afford a civil mechanism for testing the legality of plan structures and administration, but the burden of proceeding under the provision falls on the private parties involved and not the Government. There has been a substantial amount of litigation under Section 302(e)—considerably more than under the criminal provisions of paragraph (d), and recent cases have expanded the reach of federal jurisdiction to include the matters of internal plan operation that were previously foreclosed¹¹⁵ to judicial examination. The theory of the cases decided under Section 302(e) is that plan beneficiaries must be afforded the opportunity to ensure that their trustees comply with the restrictions of subsection (c)(5) in order to protect benefits for which the employees have bargained,¹¹⁶ notwithstanding the concern over the extent to which the federal courts should entertain suits which seek to review the fiduciary conduct of trustees. In *Bowers v. Ulpiano Casal, Inc.*,¹¹⁷ the court of appeals held that the remedy of injunction is only available to prevent "violations of basic structure, as determined by Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund,"¹¹⁸ and denied an application for an accounting of allegedly diverted fund assets.

The emphasis placed by the *Bowers* court on the "structural" violations of Section 302 was at issue in *Giordani v. Hoffman*.¹¹⁹ There, plaintiffs were members of the Upholsterers International Union (U.I.U.), and the defendants were the individuals making up the governing boards of the U.I.U., its welfare fund, and its pension fund. The complaint alleged that the administration of both funds was in violation of the specific provision of subsection (c)(5) that such funds be administered "for the sole and exclusive benefit of the employees." It was alleged that there had been excessive and improper compensation for the trustees of both funds, that the funds had practiced nepotism in the hiring of employees (particularly relatives of Hoffman, the U.I.U. president), that the funds had improperly employed "social security stewards" who were U.I.U. employees, that benefits had been improperly extended to officers

¹¹⁴ 29 U.S.C. § 186(e) (1970).

¹¹⁵ Compare *Copra v. Suro*, 236 F.2d 107 (1st Cir. 1956); *Giordani v. Hoffman*, 295 F. Supp. 463 (E.D. Pa. 1969); and *In re Bricklayer's Local No. 1*, 159 F. Supp. 37 (E.D. Pa. 1958), with *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965); and *Moyer v. Kirkpatrick* 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd* 387 F.2d 955 (3rd Cir. 1968).

¹¹⁶ See *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965) (by implication); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962) (by implication).

¹¹⁷ 393 F.2d 421 (1st Cir. 1968).

¹¹⁸ *Id.* at 424.

¹¹⁹ 295 F. Supp. 463 (E.D. Pa. 1969).

and employees of the U.I.U., and that there had been improper self-dealing between the funds and the union.

The defendants moved to dismiss the complaint on the ground that it went beyond allegations of mere structural deficiencies and therefore was outside the court's jurisdiction under the rationale in *Bowers*.¹²⁰ District Judge Masterson denied (in part) the motion to dismiss, stating that:

[T]he plaintiffs have described a pattern of dealings between the U.I.U. and the trust funds, particularly as reflected by the location of the offices of all three organizations in the same building in Philadelphia, which support their contention that the trust funds were not established for the 'sole and exclusive benefit' of employees. . . .

There is support for dismissing other allegations in the complaint, such as those relating to the funds' employment of union-employees [citation omitted], and those attacking the funds' contributions to each other for the purpose of affording coverage to the individual defendants. [citations omitted] These practices, however, are related inextricably to the claim that the trust funds were established for purposes other than the 'sole and exclusive benefit of the employees,' and any relief which the Court awards on the basis that the funds were improperly established inevitably would encompass these practices as well.¹²¹

The steps taken in *Giordani*¹²² towards more direct involvement in problems of fiduciary responsibility seem clearly to comply with the congressional intent underlying Section 302 far more closely than the restrictive view taken by the court in *Bowers*. If Congress were truly concerned that employer payments be made only to a trust fund with prescribed administrative safeguards—a fund which would not serve as a "payoff conduit" for union officials—then there would seem to be strong justification for the courts' requiring strict compliance with the mandate that the fund's assets be used only for statutorily permissible purposes. It should then follow that any diversion of those assets, whether for the use of the trustees, the union officers, the employers, or any third party, should be held to violate Section 302,¹²³ but this rationale has potentially troublesome consequences for the prosecutor. Although he may conclude that federal jurisdiction is properly invoked to enjoin violations under subsection (e),¹²⁴ it does not necessarily follow that those same violations would call for the imposition of criminal sanctions under subsection (d).¹²⁵

¹²⁰ *Id.* at 471-472.

¹²¹ *Id.*

¹²² *Giordani v. Hoffman*, 295 F. Supp. 463 (E.D. Pa. 1969).

¹²³ See Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 927-28 (1970).

¹²⁴ 29 U.S.C. § 186(e) (1970).

¹²⁵ *Id.* § 186(d).

Although the Department of Justice has not hesitated to act in cases which involve the basic employer-union payoff,¹²⁶ in only one case has it proceeded under circumstances involving payments to a benefit fund which did not comply with subsection (c)(5). In *United States v. Inciso*,¹²⁷ the indictment charged that the defendant, an officer of Amalgamated Local 286, caused that union to receive approximately \$420,000 in payments from the Wisconsin Can Company and other union employers. The proof at trial established that the defendant was in charge of negotiations with the various employers. As a result of these negotiations, the employers agreed to make monthly payments to the union consisting of \$3 in monthly dues and from \$5 to \$6 as insurance contributions for each employee. These amounts were segregated by the union, and the insurance payments were placed in the general account. Thereafter, the union used the payments to purchase insurance but retained \$1 of each payment in its treasury. The proof also established that some years previously the defendant had actually prepared a trust agreement for the health and welfare plan but had later abandoned it. The court of appeals concluded that this evidence was sufficient to support Inciso's conviction for aiding and abetting¹²⁸ the union's violation of Section 302.

The facts of the *Inciso*¹²⁹ case present what is arguably the clearest case for criminal prosecution—a blatant failure by a union official even to attempt to comply with the requirements of subsection (c).¹³⁰ In the situation described in the third case history,¹³¹ the problem is not quite so easily resolved. On its face, the trust fund complied with the requirement that it be administered by a board on which employers and employees are equally represented, but, as is frequently the case, the employers had abdicated their responsibility and left the management of the fund in the hands of the union. Further, although the union had written agreements with the individual employers, whose employees it had organized, detailing the basis for payments as is required by subsection (c)(5),¹³² no such agreements were made with the employers recruited by the union leader who informally participated in the fund. In this situa-

¹²⁶ See e.g., *United States v. Iozzi*, 420 F.2d 512 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971); *United States v. Fischer*, 387 F.2d 165 (2d Cir. 1969); *United States v. Annunziato*, 293 F.2d 373 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

In the last five fiscal years, forty-four indictments have been returned under section 302, and thirty-six defendants have been convicted.

¹²⁷ 292 F.2d 374 (7th Cir.), cert. denied, 368 U.S. 920 (1961).

¹²⁸ 18 U.S.C. § 2 (1970).

¹²⁹ *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961), cert. denied, 368 U.S. 920 (1961).

¹³⁰ 29 U.S.C. § 186(c) (1970).

¹³¹ See text accompanying note 13, *supra*.

¹³² 29 U.S.C. § 186(c)(5) (1970).

tion, it is clear, even under *Bowers*, that plan beneficiaries would be entitled to relief to remedy this structural deficiency, but the nature of the employees represented by the union makes it unlikely that this remedy will be sought. Government intervention¹³³ is wholly proper under these circumstances. The facts that the union official is in effective control of the fund and that the substantial possibility exists that the fund has been or will be used for his personal benefit buttress the conclusion that prosecution of the official for causing employers to make payments into a fund not within the exceptions of Section 302(c) would be an appropriate response.

Confronted with this type of operation, the prosecutor can act with little hesitation, since he is presented with a situation where he represents the only feasible solution to the problem and where the defendant's acts are in clear violation of a specific statutory provision. A more difficult problem arises where the fund is properly constituted in every way and there is a written agreement between the union and each employer detailing the basis for payment, yet, notwithstanding such agreement the union officer/trustee continues to use the fund for his own benefit by hiring friends and relatives at exorbitant salaries to administer the fund and by investing the plan's assets in his own enterprises. On these facts, should the prosecutor charge the officer with causing payments to be made into a fund which is not used for "the sole and exclusive benefit of the employees"?

It remains true that the beneficiaries and the employers connected with the fund are unlikely to seek their civil remedies,¹³⁴ but the prosecutor is now faced with a situation where the statutory standard measuring an officer's conduct involves a "range concept." The trial of such a case will require the court and jury to determine "how excessive" the compensation paid was and "to what extent" the investments were made for the benefit of the defendant. Even assuming that the jury were to find as a matter of objective fact that the fund's assets were not used solely for the benefit of the employees, there would still remain the question of whether the defendant "willfully"¹³⁵ violated the statute.¹³⁶ In the usual case involving a direct payoff from employer to union official, the Government has taken the position that the element of willfulness is established by proof that the defendant knew the operative facts, and this view is supported by the courts.¹³⁷ A similar position seems

¹³³ See *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961), *cert. denied*, 368 U.S. 920 (1961).

¹³⁴ See text accompanying notes 132-133, *supra*.

¹³⁵ 29 U.S.C. § 186(d) (1970).

¹³⁶ *Id.*

¹³⁷ *United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.) (by implication),

justified when dealing with subsection (c)(5) violations that involve failure to secure a written agreement, but it seems that the "sole and exclusive benefit" violation must require something beyond this, at least that the defendants have acted in reckless disregard of the law.^{138a} Therefore, in deciding whether or not to proceed, the prosecutor must determine not only whether, as a matter of fact, the defendant's violation of his fiduciary obligation constitutes an offense under the statute but also whether this violation is so egregious as to justify the jury in concluding that the defendant acted with the necessary *mens rea*.^{138b}

The clearest case for application of the "sole and exclusive benefit"¹³⁹ theory arises when the trustee of a plan actually steals the plan's assets, although all but a very few such cases will fall within the more specific prohibition of Section 664 of Title 18.¹⁴⁰ The only case where Section 302 has been used in this type of situation occurred, logically enough, prior to the 1962 amendments¹⁴¹ to the W.P.P.D.A. In *Arroyo v. United States*,¹⁴² the defendant, a union president, negotiated with the two corporations whose employees he represented for the establishment of a welfare fund, with the stipulation that he be made the union representative on the managing board of the fund. After an agreement was reached, the defendant asked for the two checks representing the employers' contributions for the purpose of showing them to union members at a meeting that evening. The defendant was given two \$7500 checks made out to the union, with vouchers attached identifying them as contributions to the fund. Instead of depositing the checks in the existing fund account, the defendant opened an account in the name of the fund in another bank and over the next several months used the proceeds for his personal purposes and for union expenses unrelated to the fund. The indictment charged the defendant with

cert. denied, 384 U.S. 942 (1966); *United States v. Alaimo*, 191 F. Supp. 625, 627 (N.D. Pa.), *aff'd*, 297 F.2d 604 (3rd Cir. 1961). This rule seems also to have been approved by the Seventh Circuit in *United States v. Keegan*, 331 F.2d 257 (1964), *cert. denied*, 379 U.S. 828 (1965), which limited the more stringent test of *Inciso* [292 F.2d 374 (7th Cir. 1961), *cert. denied*, 368 U.S. 920 (1961)].

^{138a} *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960).

^{138b} The excessiveness of the compensation, the extent to which the investments were made for the benefit of the defendant, the willfulness of the violation, and the determination of whether the defendant acted with the requisite *mens rea* are all examples of the problem the prosecutor must face in making the practical determination whether to proceed with criminal prosecution.

¹³⁹ 29 U.S.C. § 186(c)(3) (1970).

¹⁴⁰ 18 U.S.C. § 664 (1970).

¹⁴¹ Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35.

¹⁴² 359 U.S. 419 (1959).

violating Section 302(b)¹⁴³ by receiving \$15,000 from the two employers, and resulted in a conviction.

The United States Supreme Court¹⁴⁴ reversed the conviction on the theory that since the checks had been given by the employers in the legitimate anticipation that they would be used for the welfare fund, the payment did not violate Section 302(a)¹⁴⁵ and, thus, the receipt of the checks could not have violated Section 302(b)(1).¹⁴⁶ Justice Stewart wrote:

Without doubt the petitioner's conduct was reprehensible and immoral. It can be assumed also that he offended local criminal law. But, for the reasons stated, we hold that he did not criminally violate § 302(b) of the Labor Management Relations Act of 1947.¹⁴⁷

Justice Clark, in his dissenting opinion, concluded on the basis of the manner in which the checks were handled after receipt and his finding that the defendant had intended from the beginning to appropriate the checks to his own use,¹⁴⁸ that the checks were not "paid into a trust fund" within the meaning of subsection (c)(5).

... The petitioner, by receiving the checks from the employers and through artifice and deceit, has deprived the employees of their benefits and stands guilty under § 302(b) of the Act.¹⁴⁹

Although the government did not rely on it, another theory of prosecution was available. Since the defendant in this case¹⁵⁰ caused the employers to make contributions to a welfare fund which he knew would not be used for the "sole and exclusive benefit of the employees," he was guilty of causing a representative of the company's employees¹⁵¹ to receive payment which was not within the exception provided by subsection (c)(5). From the record, it appears that this theory was not suggested either at trial or on appeal, although there is implicit support in Justice Clark's opinion for

¹⁴³ Now, 29 U.S.C. § 186(b) (1970).

¹⁴⁴ 359 U.S. 419 (1959).

¹⁴⁵ 29 U.S.C. § 186(a) (1970).

¹⁴⁶ *Id.* § 186(b)(1).

¹⁴⁷ 359 U.S. at 427.

¹⁴⁸ *Id.* at 429.

¹⁴⁹ *Id.* at 432.

¹⁵⁰ *Arroyo v. United States*, 359 U.S. 419 (1959).

¹⁵¹ A trust in which union members participate is a representative of employees within the meaning of section 302(a) if it does not meet the requirements of subsection (c)(5). See *Brennan v. United States*, 240 F.2d 253 (8th Cir. 1957), *cert. denied*, 353 U.S. 931 (1958); *Sheet Metal Contractors Ass'n v. Sheet Metal Workers International Ass'n*, 248 F.2d 307 (9th Cir. 1957); *Paramount Plastering, Inc. v. Local No. 2*, 195 F. Supp. 287 (S.D. Cal. 1961), *aff'd*, 310 F.2d 179 (9th Cir. 1962). But see *Weir v. Chicago Plastering Institute*, 177 F. Supp. 688 (N.D. Ill. 1958), *rev'd on other grounds*, 279 F.2d 92 (7th Cir. 1960).

such an approach. Having been willing to strain the wording of the statute to conclude that the "paid into a trust fund"¹⁵² provision had not been complied with, he would have had an easier time reaching the same conclusion through the use of the "benefit" clause.¹⁵³

This approach to Section 302, if it were restricted to (c)(5)¹⁵⁴ funds, would be of little use to the prosecutor for the only funds coming under that subsection are also within the provisions of the W.P.P.D.A.¹⁵⁵ There is, however, a strong argument for applying the same theory to the vacation, apprenticeship, and scholarship funds provided for in subsections (c)(6) and (c)(7).¹⁵⁶ Those subsections do not employ the "sole and exclusive benefit" language of subsection (c)(5) but, rather, are phrased in terms of "for the purpose of . . ." and then make applicable the provisions of subsection (c)(5)(B) regarding the necessity for written agreements and equal representation. Nonetheless, it seems clear that the language of these subsections must be read to impose the same basic fiduciary obligation as does the language of subsection (c)(5),¹⁵⁷ and the diversion of apprenticeship or scholarship funds must, therefore, fall within the purview of the statute.

The legislative history behind the enactment of clauses (c)(6) and (c)(7)¹⁵⁸ reveals nothing concerning the failure to include the "sole and exclusive benefit" language, although the only reference to the purpose of (c)(6) is somewhat illuminating. Senator Goldwater's analysis of L.M.R.D.A. contains the following passage:

To the five exemptions listed in Section 302(c), the conference report adds a sixth: anything of value paid by an employer to a trust fund established by a union for the purpose of pooled vacations, holiday severance or similar benefits, or defraying costs of apprenticeship or other training programs, all subject to the same conditions applicable to welfare and benefit plans under Taft-Hartley prior to its amendment by this bill.¹⁵⁹

Enforcement of Section 302 in this manner could be of substan-

¹⁵² 359 U.S. at 431.

¹⁵³ 29 U.S.C. § 186(c)(5) (1970).

¹⁵⁴ *Id.*

¹⁵⁵ The coverage of W.P.P.D.A. overlaps that of Section 302(c)(5) except for funds covering twenty-five or fewer participants.

¹⁵⁶ 29 U.S.C. § 186(c)(6)(7) (1970).

¹⁵⁷ The phrase "for the sole and exclusive benefit of the employees" is no more than a codification of the common law duty of the trustee "to administer the trust solely in the interest of the beneficiaries." 2 SCOTT ON TRUSTS 856 (1939).

¹⁵⁸ Section (c)(6) was formerly § 505 of the Labor Management Reporting Disclosure Act of 1959, Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519 and Section (c)(7) was enacted as Act of Oct. 14, 1969, Pub. L. No. 91-86, 83 Stat. 133.

¹⁵⁹ 105 CONG. REC. 19,768 (1969).

tial importance in view of the rapid growth of vacation, apprenticeship, and scholarship funds. Unfortunately, there is presently no federal statute which makes it a crime to steal the assets of such funds, even though federal interest in their protection is comparable to that in the safeguarding of welfare and pension funds. The use of Section 302 to reach what is essentially a theft offense involves an unusual extension of jurisdiction through a statute which has not been used for that purpose in the twenty-five years since the enactment of the Taft-Hartley Act. The federal prosecutor is, however, justified in using any available tool to deal with a problem that is presently beyond the capacity of the average local law enforcement agency.

D. *Fraud*

The relatively small number of criminal prosecutions under Sections 1954¹⁶⁰ and 664¹⁶¹ indicates that the majority of depredations committed on employee benefit plans do not fit neatly into the language of either statute, but instead seem to fall under the more general heading of civil or criminal fraud. The greatest risk for any plan with large amounts of money to invest is not that someone will steal directly from the treasury, but rather that the plan will be duped by affirmative misrepresentations or concealment of material facts into lending money or making investments on inadequate security. Even with all relevant information before them, plan trustees are liable to make substantial investment errors, although it is obvious that the effect of such errors will be compounded if the financial status of the borrower or the nature of the investment is misstated. This type of misrepresentation, dangerous if made by a borrower, is infinitely more dangerous if made by or with the cooperation of a trustee, officer, or agent of the plan. If the misrepresentation is made by a borrower, there is some chance that the falsity of the representation will be revealed by independent inquiry, but such an inquiry is likely to be foreclosed where the misrepresentation is the product of collusion. Further, in a case like the Sun Valley scheme,¹⁶² the danger is magnified by the fact that the participating insider is the trustee in effective control of the decision-making process.

It is not a crime *per se* to defraud a welfare or pension plan. Federal jurisdiction exists only if interstate mailings or wire communications are used in furtherance of the scheme. The courts, however, have broadly interpreted the wire and mail fraud statutes to

¹⁶⁰ 18 U.S.C. § 1954 (1970).

¹⁶¹ *Id.* § 664.

¹⁶² See note 14 and accompanying text, *supra*.

enable them to reach schemes where, for example, there is no proof of benefit to a defrauder¹⁶³ or loss to a victim.¹⁶⁴ In *Hoffa*,¹⁶⁵ it was the Government's theory that the defendants defrauded the Central States Fund by misrepresenting to the Fund the financial status of the borrowers, knowing that the loans sought were substantially greater risks than they appeared to be on their face, and that the purpose of the scheme was to obtain from these borrowers, who were unable to get financing from other sources and were willing to pay for the privilege of borrowing money, fees which were to be diverted to the personal benefit of Hoffa and his associates in disregard of the security of the Fund. The interstate nature of the scheme necessitated the use of the mails and the telephone, thus enabling the federal government to take action, but had these same events occurred within the boundaries of one state, they would, in all likelihood, have gone unnoticed and unpunished.

There is no rational basis for restricting federal jurisdiction in the area of employee benefit plans by requiring the use of an interstate facility before criminal prosecution is possible. Federal jurisdiction has already been asserted over these plans and should be exercised to the fullest extent necessary to permit effective control. Although Section 1954 is a useful tool, it requires proof of the most difficult part of a transaction—the actual transfer of money into the hands of a plan officer. Yet, the results to a benefit plan may be as disastrous where the officer participates in a fraud and receives no kickback as where, in *Berger*,¹⁶⁶ for example, he sells out directly. In terms both of a realistic assessment of the evil to be prevented and the practical problems of proof, there seems to be little reason for requiring evidence of a bribe as an essential element of the federal offense.

A difficult problem is presented in determining if criminal prosecution is warranted where the fraud is perpetrated by the borrower alone or by other parties unconnected with the plan. Stringent sanctions for the fiduciary who violates his trust can be justified as necessary to the protection of the plan and consistent with the approach taken in related areas—bank misapplication cases, etc.,¹⁶⁷ however, it must be asked whether these sanctions are the most

¹⁶³ *Calnay v. United States*, 1 F.2d 926 (9th Cir. 1924).

¹⁶⁴ *Shale v. United States*, 388 F.2d 616 (5th Cir. 1968), *cert. denied*, 393 U.S. 984 (1968); *Hoffa v. United States*, 367 F.2d 698 (7th Cir. 1968), *vacated and remanded*, 387 U.S. 231 (1967).

¹⁶⁵ See note 14 and accompanying text, *supra*.

¹⁶⁶ *United States v. Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971).

¹⁶⁷ See text accompanying notes 10-14, *supra*.

effective or the most appropriate weapon against the individual who misrepresents solely for personal gain.

Two problems arise most frequently: first, the case where the borrower simply overstates the value of the collateral for his loan or inflates his personal net worth; and second, the case where the borrower, once he obtains a loan, diverts the proceeds for a use inconsistent with his loan application.

In the first situation, it is clear that the borrower subjects the plan to risks over and above the ones it bears in the normal course of doing business. If his misrepresentation is made knowingly, with the intent to influence the plan, he would seem to have engaged in criminally fraudulent conduct. Section 1014 of Title 18¹⁶⁸ makes it an offense for anyone to overvalue or make a false statement concerning property for the purpose of influencing a bank or other lending institution into making a loan, and assuming, as seems appropriate, that the federal government has a similar interest in employee benefit plans, their assets should be equally protected. In the second case, the problem of distinguishing between criminal and noncriminal activity becomes more acute, for there are often many reasons why loan proceeds are used for purposes not strictly within the limits set out in the loan agreement—reasons which can be perfectly legitimate or blatantly fraudulent. For example, if a borrower obtains a loan from a benefit plan for the development of property or the construction of a building, and the property is to be the security for the loan, any serious diversion of loan funds from their intended use places the plan's assets in jeopardy, and if the diversion is accomplished with fraudulent intent, the criminal sanction is an appropriate remedy.

In *Hoffa*, the government proceeded on the theory that the misrepresentations made to the fund and the diversions of loan proceeds to the benefit of Sun Valley were integral parts of the scheme

168 Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration . . . a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$5,000 or imprisoned not more than two years, or both. 18 U.S.C. § 1014 (1970).

to defraud. The majority decision in the court of appeals found the proof to have been sufficient to support that theory. In the dissent, however, Judge Swygert concluded, *inter alia*, that the government's proof had shown not one but several conspiracies, thereby prejudicing the defendants. He found the bulk of the proof concerning Hoffa's involvement in Sun Valley irrelevant to the fraud charged except to the extent that it may have shown the motive of the defendants.¹⁶⁹

Although it is implicit in Judge Swygert's opinion that false representations made by a borrower for the purpose of procuring a loan from a benefit plan would constitute a fraud, it does not necessarily follow that the diversion of funds without active misrepresentations cannot call for the imposition of criminal sanctions under a properly drafted statute. The following is a proposal for a statute which would consolidate the conversion offenses of Section 664 and the fraud offenses discussed here:

Misuse of employee benefit plan assets.

(a) Whoever—

(1) embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another any of the assets of an employee benefit plan; or

(2) by any scheme or device defrauds such plan or makes or submits a false statement of material fact to such plan or its administrators, officers, trustees, agents, employees, or counsel with the intent to cause such plan to make a loan of any of its assets, or disburse the proceeds of such loan, or otherwise transfer any of its assets to any person; or

(3) having obtained such a loan, willfully converts the proceeds thereof to a use not approved by the plan which either adversely affects the value of any security for such loan or which is in

¹⁶⁹ See *United States v. Hoffa*, 367 F.2d 698, 724 (7th Cir. 1966), *vacated and remanded*, 387 U.S. 231 (1967):

... If rescuing Sun Valley was an "end," then for purposes of this case it could have been no more than the lawful object of a conspiracy to achieve a lawful end by unlawful means.

A similar observation should be made with respect to the aura of criminality cast about the payment of fees ("pay-offs") and other "diversions" from loan proceeds as such. The payment of a fee to one who assists in the procurement of a loan, whatever else it may be, is not of itself a fraud upon the lender. Nor are "diversions" fraudulent standing alone. . . .

The gist of the crime charged in this case resides in the allegations and evidence submitted in respect to false and fraudulent representations made to the Pension Fund by the defendants. Unless this essential element of the crime was proved, the alleged diversions of money to Sun Valley, although necessary to bind the defendants together, were meaningless. . . .

... The Government asserts that knowing participation in the conspiracy is shown by the awareness on the part of certain defendants that the "price" of getting Pension Fund loans was to make money available to rehabilitate Sun Valley. While such conduct may be morally reprehensible, it does not amount to a fraud upon the Pension Fund, the crime charged in the indictment absent some misrepresentation to the Fund.

furtherance of an act, plan, or scheme in violation of the laws of the United States or of the State in which the proceeds are so used shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

- (b) As used in this section the terms—"any employee benefit plan" means any such plan subject to the Welfare and Pension Plans Disclosure Act or any such plan providing pooled vacation, holiday, severance, or similar benefits or defraying costs of apprenticeship or other training programs or providing scholarships or child care centers; "assets" means the moneys, funds, securities, premiums, credits, property, or other assets of such plan; "loan" includes the making, renewal, or extension of a loan, or the acceptance, release, or substitution of security therefor.

IV. THE SOLUTIONS

The testimony of Labor Secretary Goldberg before the House Subcommittee on Labor describes the enforcement of the 1958 Act in these terms:

... [T]he act's concept is self-policing, relying principally on individual employees or participants to compel compliance through private litigation brought by them or by other means. This is the ultimate in unreality. Experience has shown that employee suits, if provided as a means of enforcement, are seldom pursued and therefore are inadequate as enforcement remedies; the Department of Labor learned this under the Fair Labor Standards Act. Individual employees, lacking financial resources, can be easily intimidated, subjected to reprisals, and discouraged from taking effective action. To the best of our knowledge, only one beneficiary suit has been instituted under the Disclosure Act.¹⁷⁰

It provides some insight into the workings of Congress to realize that this analysis of the deficiencies of disclosure was presented as part of an effort to create a bigger and better disclosure scheme. Secretary Goldberg, one assumes, believed that the proposed amendments giving the Department of Labor the power to enforce compliance with the Act's reporting requirements would remedy these deficiencies, but he failed to come to grips with the real problem. The reason that reliance on individual beneficiaries to enforce the law is "the ultimate in unreality" is not that individuals cannot be counted on to make their plan administrators file reports, but rather, that, even after all the reports have been filed, the individual beneficiary is unable to act on the violations of fiduciary duty which these reports reveal.

The "unreality" that was perpetuated by the 1962 amendments¹⁷¹ is exemplified by the fifth case history described previ-

¹⁷⁰ 1961 House Hearings, *supra* note 49, at 13.

¹⁷¹ Plan beneficiaries are not totally powerless to remedy improper administration

ously.¹⁷² There, the plan, under the influence of one of its trustees, lent money to a company in which that trustee had an interest to enable the company to make a contract with the plan providing substantial fees for administrative services. Nothing in that particular transaction violated the Act.¹⁷³ Only if the trustee conceals his interest in the company and thereby causes the plan to file an annual report failing to disclose a loan to a party-in-interest,¹⁷⁴ has a federal criminal statute¹⁷⁵ been violated. If the trustee's interest is disclosed, the federal interest in the plan's operation is terminated; the fact that the administrative company receives an exorbitant fee or that the insurance agent switches policies to obtain higher commissions is not a matter of concern for the Secretary of Labor, although these were exactly the kinds of problems uncovered eighteen years ago by the Ives¹⁷⁶ and Douglas¹⁷⁷ Committees.

Of course, the compliance officer in the Department of Labor who reviews the report may well surmise that, if self-dealing and high commissions are present, there is a substantial likelihood that kickbacks are being paid to plan officers or to the trustees, and he may refer the matter to the Department of Justice. However, this presupposes that the annual reports will be reviewed closely enough to disclose these danger signs. Unfortunately, this supposition is unsupported by the facts. In 1971, the Department of Labor received 6,530 initial plan descriptions and 70,525 annual reports.¹⁷⁸ During the same period, "desk audits" were performed on 1,665 annual reports (approximately 2.3% of the total received),¹⁷⁹ and 2,512 "investigative cases" were opened, the great bulk of which—2,375—involved delinquent reporting.¹⁸⁰ Of the total of 1,436 cases closed during 1971, voluntary compliance was achieved in ninety-five percent.¹⁸¹

of benefit funds as is evidenced by the successful suit of a number of members of the United Mine Workers of America Welfare and Retirement Fund of 1950. The decision of District Judge Gesell in *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971), ordered the Fund's trustees, among whom was W. A. Boyle, president of the union, removed, ordered the Fund to obtain independent investment counsel, and ordered the Fund's assets withdrawn from the National Bank of Washington, which was controlled by the union.

¹⁷² See text subsequent to note 14, *supra*.

¹⁷³ 18 U.S.C. § 664 (1970).

¹⁷⁴ Such disclosure is required by 29 U.S.C. § 306(f)(1)(D).

¹⁷⁵ 18 U.S.C. § 1027 (1970). See note 58 for the text of § 1027.

¹⁷⁶ See note 21, *supra*.

¹⁷⁷ See notes 22, 24, *supra*.

¹⁷⁸ 1971 W.P.P.D.A. Report, *supra* note 84, at 5.

¹⁷⁹ *Id.* at 9.

¹⁸⁰ *Id.* at 11.

¹⁸¹ *Id.* at 10.

These figures do not represent a failure on the part of the Department of Labor to enforce the Act; rather they represent Congressional failure to provide the manpower and equipment necessary to fulfill the aim of the 1962 amendments to make the Secretary of Labor something more than a custodian of records. Even with the broadest statutory jurisdiction, it is impossible to achieve effective enforcement of the basic disclosure requirements, on the results of which litigation by individual beneficiaries must depend, unless sufficient resources can be made available for the examination of reports, the collation and retrieval in usable form of the information contained in the reports, and the investigation of violations.¹⁸² Nor can there be effective criminal enforcement unless these basic requirements are met and unless an investigative staff of sufficient size is made available to conduct the full-scale audits and field interviews necessary for the development of criminal cases. It was pointed out earlier that the disclosure requirements of the W.P.P.D.A. have meant that there is an agency which concerns itself with the problems of employee benefit plans and which can begin to provide information to the prosecutor charged with enforcement of the criminal provisions of the Act; however, something more is needed if federal control over welfare and pension plans is to become anything other than a stop-gap remedy.

This is not to say that the solution to the problem of benefit plan regulation is an expansion of federal criminal jurisdiction. On the contrary, the kinds of mismanagement exemplified in the fifth case history do not readily lend themselves to regulation by criminal prosecution. The solution is to recognize the inadequacy of criminal prosecution as a regulatory mechanism and replace it with a system capable of dealing with the whole range of issues raised by the operation of the modern benefit plan rather than with only that limited class of problems which presently warrant the intervention of the prosecutor.

The first step in this process is to recognize that the federal government can no longer afford the luxury of excusing itself from involvement in the internal affairs of benefit plans. Such recognition is evident in the bills now before Congress which are designed to establish and enforce certain basic fiduciary standards for plan

¹⁸² Reports filed under W.P.P.D.A. are stored in the Department of Labor, and, except for very basic identifying information, there is no indexing system which would permit an investigator to determine, for example, how many plans a particular company performs administrative services for or whether a particular individual has loans outstanding with one or more benefit plans. Until this type of information can be readily obtained, preferably through some form of computerization, the utility of the W.P.P.D.A.'s disclosure system is substantially impaired.

trustees,¹⁸³ but in addition to a regulatory system, there must be a commitment of funds sufficient to permit it to operate effectively. Until legislation of this type is passed and implemented, the prosecutor will continue to do what he can within the limits of his jurisdiction, but he would rather retire to the sidelines, leaving the day-to-day regulatory battle to those better equipped to cope with it.

¹⁸³ The standards set out in both S. 2, 92d Cong., 1st Sess. § 402 (1971), and S. 3024, 92d Cong., 1st Sess. § 14 (1971), are virtually identical.